

FEB 27 1967

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1967

No. 319

Nugent Kautz, et al.,
Petitioners

v

Department of Game of the State of
Washington
and the

Department of Fisheries of the
State of Washington
Respondents

On Writ of Certiorari to the Washington State
Supreme Court

BRIEF OF PETITIONERS

JACK E. TANNER,

Attorney for Petitioners.

812 Puget Sound Bk. Bldg., Tacoma, Washington 98402. Tel. 272-2308

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1967

No. 319

Nugent Kautz, et al.,
Petitioners

v

Department of Game of the State of
Washington

and the

Department of Fisheries of the
State of Washington
Respondents

On Writ of Certiorari to the Washington State
Supreme Court

BRIEF OF PETITIONERS

JACK E. TANNER,
Attorney for Petitioners.

812 Puget Sound Bk. Bldg., Tacoma, Washington 98402. Tel. 272-2308

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1967
No. 319

Nugent Kautz, et al.,
Petitioners

v

Department of Game of the State of
Washington

and the

Department of Fisheries of the
State of Washington
Respondents

On Writ of Certiorari to the Washington State
Supreme Court

BRIEF OF PETITIONERS

OPINIONS IN THE COURTS BELOW

On January 12, 1967, the Supreme Court of the State of Washington in the case of the Department of Game et. al., Respondents vs. Nugent Kautz, et. al., Appellants 70 Wd. 2nd, 270 (A11-18) upheld the decision of the Superior Court of Pierce County, Washington, rendered on August 13, 1965. The decision of August 13, 1965, by the Superior Court of Pierce

County (A10) permanently enjoined the Petitioners from fishing in the Nisqually River water shed in a manner contrary to the statutes of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington (A11).

STATEMENT OF GROUNDS AS TO JURISDICTION

The Petitioners submit that the Supreme Court of the United States does have jurisdiction in this matter, and that substantial federal questions as to Indian Treaties are involved in this case. The jurisdiction of this court is invoked under Article VI, Section 2 of the United States Constitution; the Treaty of Medicine Creek of 1854; 10 stat. 1132; Public Law 280, stat. 588; all of which involve Indian Treaties and Indian jurisdiction; and the XIV Amendment of the United States Constitution, Section 1, (See appendices A, B and C). That the Petitioners as "Treaty Indians" are entitled to the protection of this court as to their privileges and immunities "and as to the equal protection of the law" guaranteed by the XIV Amendment, Section 1 of the United States Constitution.

That jurisdiction of the Superior Court of Pierce County was challenged by the Petitioners in the lower court (A5), and was again challenged in the Supreme Court of the State of Washington. That the Challenge to jurisdiction was considered, discussed, and denied in the trial court (A10) and again in the Supreme Court of the State of Washington (A13).

QUESTIONS PRESENTED

The questions presented for review are:

1. Does the State of Washington have jurisdiction over persons of the petitioners as they are successors in interest of the Nisqually Tribe of Indians who were signators to the Treaty of Medicine Creek of 1854?
2. Do the Courts of the State of Washington have jurisdiction over the subject matter of Article II of the Treaty of Medicine Creek; namely, "Indian fishing" at the usual and accustomed fishing grounds?
3. Can the State of Washington, acting through the Department of Game and the Department of Fisheries of the State of Washington, regulate and prohibit in any manner Petitioners who are claiming fishing rights at the "usual and accustomed fishing grounds" as beneficiaries of the Treaty of Medicine Creek?

STATEMENT OF THE CASE

On January 22, 1964, the Department of Game and the Department of Fisheries of the State of Washington, filed a complaint in the Superior Court of Pierce County, Washington, (A2) asking for a declaratory judgment against the Petitioners. The two State agencies were seeking an injunction preventing the Petitioners from fishing off the Indian reservation boundaries of the Nisqually River in any manner inconsistent with State statutes and regulations of State Departments of Game and Fish. In many court appearances, the Appellants denied the jurisdiction of the State of Washington over both the subject matter of the complaint; namely, "Indian fishing" on the Nisqually River and also as to the persons of the Petitioners.

Petitioners were then and are now claiming certain benefits as successors in interest of the signators to the Treaty of Medicine Creek.

That Superior Court of the State of Washington did grant a temporary restraining order preventing the Petitioners from fishing in any manner contrary to the State statutes and regulations of the State Departments of Game and Fish. That after a long period of time, both parties entered into a Stipulation of Fact (A6), and on August 13, 1965, the trial court entered Findings of Fact and Conclusions of Law, (A7, A8, and A9) and Judgment and Decree (A10) granting the State agencies a permanent injunction. Notice of Appeal was timely given on September 8, 1965.

The matter was then argued before the Supreme Court of the State of Washington which rendered its decision on January 12, 1967, upholding the decision of the trial court. The Petitioners then timely filed a petition for rehearing on February 8, 1967. The said petition was denied. On June 30, 1967, Petitioners herein, after receiving permission for an extension of time, filed a petition for a Writ of Certiorari to this court. This court granted the Writ on December 18, 1967.

ARGUMENT

The Petitioners submit that as beneficiaries of the members of the Nisqually Indian Tribe, signators to the Treaty of Medicine Creek of 1854, that they are entitled to fish under Article III at the "usual and accustomed fishing grounds," namely, the entire Nisqually River without interference by the State of Washington or interference by any other city, county or State agency. That they are entitled, as Treaty Indians, to

the protection of Article VI, Section 2 of the United States Constitution; the Treaty of Medicine Creek of 1854, 10 stat. 1132; Public Law 280, 67 stat. 588; and to those privileges and immunities and equal protection of the law of the XIV Amendment to the United States Constitution, Section 1.

That Public Law 280, specifically excludes State jurisdiction, by licensing or regulation, over Indian fishing under Federal Treaty.

That Article VI, Section 2 of the U. S. Constitution provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land", and anything in the Constitution or laws of any state to the contrary notwithstanding.

That the State of Washington at the time of the signing of the Treaty between the Federal Government and the various Indian tribes was not then a State, and is not a party to the Treaty, and therefore, has no jurisdiction as to either the subject matter of the Treaty nor as to the persons of the Petitioners and their fishing rights under the Treaty.

CONCLUSION

The Appellants vigorously disagree with the Supreme Court of the State of Washington as to its statement in the decision affirming the trial court's decision which states that:

"A state court has the right to be wrong (A15) in such a case."

Since Indian treaties are the supreme law of the land and, therefore, by definition exclude state interference, the State cannot then eliminate the State

action; namely, regulation and prohibition, the benefits enjoyed by the Petitioners as "Treaty Indians" who are fishing at the "usual and accustomed fishing grounds." The Appellants respectfully request that this court enter an order reversing the decision of the Supreme Court of the State of Washington, and then declare the Treaty of Medicine Creek as the supreme law of the land, and further that the Petitioners as "Treaty Indians" do have certain privileges and immunities without interference of any kind from the State of Washington or its sub-divisions as to their fishing at the "usual and accustomed fishing grounds" under Article III of the Treaty of Medicine Creek.

Respectfully submitted,

JACK E. TANNER,
Attorney for Petitioners.

APPENDIX A

Dec. 26, 1854

FRANKLIN PIERCE
PRESIDENT OF THE
UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

[Title.]

WHEREAS a treaty was made and concluded on the Sre-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the Shē-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Ste-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

[Cession to United States.]

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all of their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Duwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek; to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon Island, easterly and southeasterly, to the place of beginning.

[Reservation for said tribes; Removal thereto;
Roads may be constructed.]

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract contain-

ing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

[Rights to fish.]

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

[Payments for said cession; How applied.]

ARTICLE IV. In consideration for the above cession, the United States agree to pay to the said tribes

and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

[Expense of removal, &c.]

ARTICLE V. To enable the said Indians to remove and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to laid out and expended under the direction of the President, and in such manner as he shall approve.

[Removal from said reservation; Ante, p. 1044.]

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or

may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

[Annuities not to be taken for debts.]

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

[Stipulations respecting conduct of Indians.]

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of

the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

[Intemperance.]

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

[Schools, shops, &c.]

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with these of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agrees to employ a physician to reside at the said central

agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees and medical attendance to be defrayed by the United States, and not deducted from the annuities.

[Slaves to be freed.]

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

[Trade out of the limits of U. S. forbidden;
Foreign Indians not to reside on reservation.]

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

[Treaty, when to take effect.]

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS

[L. S.]

Governor and Superintendent Territory of Washington.

APPENDIX B?

ARTICLE VI, SECTION 2.— U. S. CONSTITUTION.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, and any thing in the Constitution or laws of any state to the contrary notwithstanding.

AMENDMENT XIV, SECTION 1 —
U. S. CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

APPENDIX C

Public Law 280

CHAPTER 505

August 15, 1953

[H. R. 1063]

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such states, and for other purposes.

[Indians; State jurisdiction over criminal offenses.]

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of

such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reserva- tion.
Wisconsin.....	All Indian country within the State, except the Menominee Reservation.

[Taxation of property, etc.]

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or, the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

[State jurisdiction over civil causes.]

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State, except the Menominee Reservation.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water right, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

[Repeal.]

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

[Removal of legal impediment.]

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil

and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

[Consent of U. S. to other States.]

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.